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From:

Sent: Wednesday, March 30, 2011 10:47:57 AM

To:

Cc:

Subject: RE: Follow Up Question

You have explained the order of events as follows:

Taxpayer late-filed returns for , , and in 2006.
manually prepared Letter 1058, *Final Notice of Intent to Levy and Your Rights to a CDP Hearing*,
issued (pre-assessment)

assessments of amounts shown on returns
CP14 (first contact letter - balance due over \$)
503
504
wage levy (continuous)

We discussed how the Letter 1058 was issued prematurely. Had the taxpayer requested a hearing, the Settlement Officer should have determined that there had been no assessment and that the levy may not proceed. The taxpayer was entitled, by statute, to CDP rights (levy) no fewer than 30 days before the levy, but based on the assessments. Accordingly, because the Letter 1058 was invalid, the wage levy was premature and not in accordance with administrative procedures. This is enough to permit a return of the levied proceeds under section 6343(d)(2)(A). The Service may not, however, return any proceeds received more than nine months after the levy. See flush language of section 6343(b) following section 6343(b)(3) (as cross-referenced by the flush language of section 6343(d) following section 6343(d)(2)).

I advised that the Service must release the levy and, if it intends to levy again, to issue section 6330 rights to the taxpayer. I also suggested that the Revenue Officer may explain to the taxpayer that the continuous levy had been made in violation of the procedures and that the Service could return those proceeds received within the last nine months, but that it might be better to come in work out a collection alternative (e.g., an installment agreement or offer in compromise). Although the levy was premature, there is a liability and the levy proceeds properly went to reduce the balance (and the associated accrual of interest).

You are now questioning whether 6343(d)(2)(D) also is applicable. Subparagraph (D) allows the Service to return levied proceeds with the consent of the National Taxpayer Advocate if the return would be in the best interests of the taxpayer and the United States. The regulation seems to imply that the Service must return proceeds levied in violation of subparagraph (D). I agree that Treas. Reg. Sec. 301.6343-3(d)(1)(i) describes this situation (levy before section 6330(a) CDP rights expire). Even though the taxpayer has not contacted the National Taxpayer Advocate's Office, the Service may find that the return of the

property would be in the best interest of the taxpayer. Treas. Reg. Sec. 301-6343-3(c)(4)(ii). The question, therefore, is whether Treas. Reg. Sec. 301.6343-3(d)(1)(i) really means that "the IRS will release the levy and return the taxpayer's property." (emphasis added).

Your question is answered by Treasury regulation sec. 301.6343-3(g), which provides that the Commissioner may independently make the determination as to whether a condition exists authorizing the return of property (independent of a taxpayer request). In this case, the Service has now made this determination (i.e., that the return of the property would be in the best interest of the taxpayer and the United States). The regulation further provides that the Commissioner "may (but is not required to, unless the reason for the return of property is that the levy was made in violation of law and is governed by [301.6343-3(d)]) authorize the return of property." Accordingly, because the reason for the return of property is that the levy was made in violation of law and is governed by 301.6343-3(d), the Service is indeed required to return the money remitted within the last nine months pursuant to the continuous wage levy. Note, however, that the Service should not return such remittances without the taxpayer's consent. See the last sentence of Treas. Reg. Sec. 301.6343-3(g). This means that the Service must inform the taxpayer of the violation and offer to return the proper amount.

Section 6343(d)(1)(A) applies because the levy was premature. The levy was premature because the taxpayer was not afforded CDP rights with respect to the assessment. The CDP notice was invalid and ineffective. Although it was invalid and ineffective because it was prematurely issued, that doesn't mitigate against the notice's invalidity. The bottom line is that the taxpayer was not afforded CDP rights with respect to the assessments that are the subject of the levy. The Revenue Officer still might be able to convince the taxpayer that it would be better to come in work out a collection alternative, but the Service needs to at least offer to return the money.

Good catch with respect to the "best interests of the taxpayer ... and the United States." I will amend my earlier advice to require the Service to return the levy proceeds remitted within the last nine months, subject to the taxpayer's consent.

Feel free to give me a call if you want to further discuss any aspect of this advice. Also, if you have a TECH-MIS number for this matter, please share it with me so that I can put my time to a WLI.

Best Regards,